

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLENN R. MINDEN

Claimant

VS.

PAOLA HOUSING AUTHORITY

Respondent

AND

**TRAVELERS INDEMNITY COMPANY OF
AMERICA**

Insurance Carrier

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Docket No. 1,025,883

ORDER

Claimant appeals the November 17, 2008, Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts (ALJ). Claimant's request for interest penalties under K.S.A. 44-512b was denied after the ALJ determined that she did not have jurisdiction to assess interest on an award pending the outcome of the appeal filed before the Kansas Court of Appeals.

Claimant appeared by his attorney, Michael J. Haight of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, Shelly E. Naughtin of Overland Park, Kansas.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Motion Hearing held June 5, 2008; the transcript of Motion Hearing held November 17, 2008; and the documents filed of record in this matter.

ISSUE

Did the ALJ have jurisdiction to assess pre-award interest under K.S.A. 44-512b? Claimant argues that he is entitled to interest from the Board's Order of February 27, 2008. Claimant argues that, even though the matter has been appealed to the Court of Appeals

on the issue of the nature and extent of claimant's disability, the fact that respondent did not cross-appeal entitles him to interest. Respondent argues that the nature and extent of claimant's disability has been contested from the inception of this matter, and nothing is due at this time. Therefore, interest would not be appropriate.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Preliminary Decision should be reversed.

Claimant began working for respondent in February 2005. On August 8, 2005, he suffered an accidental injury to his low back which arose out of and in the course of his employment with respondent. Claimant underwent a surgery to his low back on December 22, 2005, consisting of a decompression destenosis and posterior spinal fusion from L3 to L5 with instrumentation and bone grafting. Claimant was returned to work with restrictions, but failed to call in or appear at work at the appropriate times and was terminated on March 23, 2006. Claimant's termination was for violating respondent's attendance policies and for insubordination to his supervisors, as well as disrespectful conduct. Claimant's award was limited to a 25 percent whole body functional disability. The matter was appealed to the Board, which, in its Order of February 27, 2008, reduced the award to a 22.5 percent whole body functional disability. Additional permanent partial general (work) disability was denied due to the circumstances leading to claimant's termination. The Board affirmed the ALJ's determination that claimant did not demonstrate a good faith effort to retain his employment with respondent. The Board's Order was appealed by claimant to the Kansas Court of Appeals, which affirmed the Board's decision in a Memorandum Opinion on March 6, 2009. A Petition for Review was filed with the Kansas Supreme Court, but, as of this date, no decision from the Supreme Court has been rendered. When the Board entered its February 27, 2008, Order, the entire award was due and owing as the entire award would have paid out as of October 2, 2007.

Claimant filed a Motion on April 14, 2008, requesting interest under K.S.A. 44-512b. Claimant argued that, since respondent had not cross-appealed the Board's Order, then respondent had no just excuse for its failure to pay the compensation claimant was granted in the Board's Order. The matter was heard by ALJ Robert H. Foerschler on June 5, 2008. ALJ Foerschler indicated that he lacked the jurisdiction to determine the matter, but then took the matter under advisement. ALJ Marcia L. Yates Roberts then issued a Preliminary Decision on July 24, 2008, denying claimant's request for penalties, finding that it was "inappropriate at this time to address the issue of Claimant's claim for interest or penalties pursuant to the Kansas Workers Compensation Act". No appeal was taken from that decision.

A second Motion was filed by claimant on September 26, 2008, again requesting interest for respondent's failure to pay the benefits granted by the Board on February 27, 2008. Claimant argues that only claimant's entitlement to work disability was appealed. The award for a 20 percent disability based on claimant's functional impairment is uncontested as a minimum and, as such, interest would be appropriate on that amount. Respondent argues that the nature and extent of claimant's disability remains in dispute before the Court of Appeals and no money is due and owing at this time, as no final Award has been issued. However, compensability is not at issue before the appellate courts. The matter came before ALJ Yates Roberts on November 17, 2008, and a Preliminary Decision of that date again found that the ALJ did not have jurisdiction to assess interest pending the outcome of the appeal. That decision is now before the Board.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act is designed to be self-enacting. The legislature intended that employers and insurance companies would voluntarily pay injured workers without first being ordered. If that is not the case, then the Act provides that injured workers shall be entitled to interest when an employer or insurance carrier did not have a legitimate reason for failing to pay compensation before an award. The Act provides:

(a) Whenever the administrative law judge or board finds, **upon a hearing conducted pursuant to K.S.A. 44-523** and amendments thereto or **upon review or appeal of an award entered in such a hearing**, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due. (Emphasis added)¹

Thus, under K.S.A. 44-512b, the time for requesting pre-award interest is at the time of the first full hearing (a.k.a. the regular hearing) before the ALJ, and the Board determines the injured worker's request for an award on all the evidence (a.k.a. the final award). That procedure allows the parties to present evidence on the issues of whether there was just cause or excuse to withhold payment. Here, claimant failed to request

¹ K.S.A. 44-512b(a).

pre-award interest until the claim had reached the Kansas Court of Appeals. Accordingly, K.S.A. 2005 Supp. 44-556(b) controls. And that statute provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.²

That statute implicitly allows a respondent to withhold payment of those benefits that accrue before that 10-week period. As claimant's award would have paid out in October 2007, no benefits were due claimant under K.S.A. 2005 Supp. 44-556(b) during the appeal to the Court of Appeals.

In summary, the request for pre-award interest and the related demand for a minimum payment did not occur until after the final award was determined and the matter appealed to the Kansas Court of Appeals. Up to that point, the issue of the nature and extent of claimant's injury and disability were hotly contested. The argument that a minimal amount should have been paid in advance of the award, and a demand for same, was not raised to the ALJ or the Board in a timely fashion.

Although claimant's request at this juncture for pre-award interest may lack all merit, the ALJ nevertheless has the jurisdiction and authority to rule on claimant's request. The mere fact that a claim is appealed to the Court of Appeals does not take away an administrative law judge's authority to rule on issues that are not before that appellate body. And, in this instance, the issue of pre-award interest is not before the Court of Appeals.

While it would normally be proper to remand the matter to the ALJ, here, the interests of judicial economy argue for a determination by the Board without that remand. In this instance, the Board finds that claimant is not entitled to pre-award interest.

CONCLUSIONS

The ALJ had jurisdiction to decide the questions of claimant's entitlement to pre-judgment interest under K.S.A. 44-512b. Therefore, the determination by the ALJ that she did not have jurisdiction to determine that issue is reversed. However, the Board finds that claimant would not be entitled to pre-award interest under K.S.A. 44-512b based upon the above findings.

² K.S.A. 44-556(b).

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated November 17, 2008, should be, and is hereby, reversed with regard to the Administrative Law Judge's determination that she did not have jurisdiction to determine pre-award interest. But the Board finds that claimant would not be entitled to pre-award interest under K.S.A. 44-512b based upon the above findings.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge